

AGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6750 OF 2022

Rosmerta Technologies Ltd. ...Petitioner

V/s.

State of Maharashtra through
Principal Secretary & Anr. ...Respondents

Mr. Sanjeev P. Kadam with Mr. Ramdas Hakke Patil
for the petitioner.

Mr. A. A. Kumbhakoni, Advocate General with Mr. P.
P. Kakade, Government Pleader, Mr. M. M. Pabale,
AGP and Ms. Sneha Bhanage for the respondent
(State).

**CORAM: DIPANKAR DATTA, CJ. &
M. S. KARNIK, J.**

**RESERVED ON : AUGUST 30, 2022
PRONOUNCED ON : SEPTEMBER 20, 2022**

JUDGMENT: [per the Chief Justice]

1. Motor Vehicles Department, Government of Maharashtra (hereafter "GoM", for short) issued Tender Notification No. TCO/Comp/RCDLTender/2021/On4180 dated 25th March 2021 in the form of a REQUEST FOR PROPOSAL (hereafter "RFP", for short) for Selection of a Service Provider for Centralized Printing of Registration Certificates and Driving Licenses for a period of five (5) years.

2. In this writ petition dated 6th June 2022, the petitioner has questioned clauses 2.15 and 2.16 of the RFP on grounds as urged therein and has prayed for, *inter alia*, the following relief:

“(A) Pass a direction/order in the nature of Mandamus or Certiorari or any other writ thereby quashing or setting aside the referred RFP dated 25.03.2021, thereby quashing the impugned discriminatory, arbitrary and tailor-made eligibility condition as embodied under Clause 2.16, Sr. No. 1 (Turnover), Clause 2.16, Sr. No. 2 (Net-worth), Clause 2.16, Sr. No. 5 (experience), Clause 2.15 of the impugned RFP issued for *“Section of a Service Provider for Centralized Printing of Registration Certificates and Driving License for Motor Vehicles Department in the State of Maharashtra for a period of 5 years* for the same being violative of Article 14 and 19(1)(g).

(B) Pass an order, directing Respondent no. 2 to issue a fresh RFP for selection of service provider for issuance of DL/RC Smart Cards by replacing the pre-qualification conditions as embodied in Clause 2.16, Sr. No.1 (Turnover), Clause 2.16, Sr. No. 2 (Net-worth), Clause 2.16, Sr. No. 5 (experience), Clause 2.15; of the aforementioned RFP, with modified terms which are fair and competitive.”

3. Since clauses 2.15 and 2.16 (partly) are under challenge, we consider it appropriate to extract the same in its entirety below for facility of appreciation. The said clauses read thus:

“2.15 Pre-Qualification Criteria

This invitation for bids is open to bidders who are eligible to do business in India under relevant Indian laws as is in force at the time of bidding as per the criteria mentioned in the RFP. The bidder shall submit all the documents as mentioned below and additionally other documents as necessary. Only bids qualifying the criteria below would be eligible for further technical evaluation.

Sr. No.	Criteria	Documents Required
1.	Legal Entity: The bidder should be a company registered under Indian Companies Act, 1956/ 2013 as amended from time to time.	- Copy of Certificates of incorporation. - Articles of Association (AOA) or Memorandum of Association (MoA)
2.	Financial: Average Turnover – similar work The average annual turnover of the bidder should be at least Rs. 100 crore from manufacturing / supplying, and printing PC/PVC/PetG/ ABS cards in India in the last three financial years.	- Certificate from Statutory Auditors. - Copy of Audited Financial Statements. - Details mentioned in format as mentioned in <u>Annexure 24</u>
3.	Financial: Net Worth The bidder shall have Positive Net Worth in the last three financial years Net Worth to be calculated as per Companies Act 1956/ 2013, as amended from time to time.	- Certificate from Statutory Auditors. - Copy of Audited Financial Statements. - Details mentioned in format as mentioned in <u>Annexure 24</u>
4.	Technical Capability: The bidder should have an experience of manufacturing/ supplying, and printing of at least 1 crore PC/PVC/PetG/ ABS cards, during the last 3 financial years in Government (State/Central)/ Semi Government/	- Copy of the work order along with copy of the contract agreement mentioning the relevant Scope of Work and Project value. - Completion Certificate OR In case of an on-going project, a partial completion certificate from the client on the client's

	Corporation/PSU/PSU Banks in India.	letter head with project completion value matching the required criteria. Details of the projects should be mentioned in the format as per Annexure 23.
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2.16 Technical Evaluation

After Pre-Qualification Evaluation, the Technical Bids will be opened and evaluated against Technical Qualification Parameters explained in the RFP. The **Total Technical Score (TS)** will be calculated out of 100 Marks, and shall be evaluated as per the table provided, and the bidder scoring at least 70 marks shall be considered for sample testing of PC cards.

Sr. No.	Technical Evaluation Parameter	Max. marks
1.	Financial Bidder's Average Annual Turnover: The average annual turnover of the bidder should be at least Rs. 100 crore from manufacturing/supplying, and printing PC/ PVC/ PetG/ABS cards in India in the last three financial years. <u>Average annual turnover:</u> <100 crore = Disqualified >+100 crore and <150 crore = 10 marks >+150 crore and <200 crore = 15 marks >+200 crore and <250 crore = 20 marks >+250 crore and <300 crore = 25 marks <=300 crore =30 marks	30
2.	Financials : Bidder's Net Worth The bidder shall have Positive Net Worth in the last financial year Bidder's Net Worth: <0 Crore = Disqualified >=0 core and < 3 crore = 5 marks >=3 core and < 6 crore = 7 marks >=6 core = 10 marks	10

3.	Technical Capability: The bidder should have an experience of manufacturing/supplying, and printing of at least 1 crore PC/PVC/PetG/ABS cards, during the last 3 financial years in Government (State/Central) / Semi Government/ Corporation/PSU/PSU Banks in India <1 Crore = Disqualified >=1 core and <1.50 crore 10 marks >=1.50 crore and < 2 crore 20 marks >=2 crore = 30 marks (Provide details with supporting document of the project in annexure 23)	30
4.	Bidder's Experience: Printing Experience The bidder should have an experience in printing of Polycarbonate cards through Laser Engraving technology, in Government (State/Central)/Semi Government/Corporation/PSU/PSU Banks in India in the last three financial years: 1 project with atleast 10000 PC cards = 5 marks 2 project with atleast 20000 PC cards = 10 marks 3 projects with atleast 30000 PC cards =15 marks (Provide details with supporting document of the project in annexure 23)	15
5.	Manufacturer Details: The bidder is a manufacturer of PC cards, have manufactured and supplied atleast 10000 PC cards in India in the last three financial years: If not a manufacturer = 0 Marks. If a manufacturer = 15 marks (Provide details in annexure 25)	15
TOTAL TECHNICAL SCORE (TS)		100"

4. The basic ground on which Mr. Kadam, learned advocate for the petitioner, has assailed clauses 2.15 and 2.16 of the RFP is that the same are tailor-made to favour only a few bidders and to exclude others like the petitioner from the fray.

According to him, the intention of the GoM is to facilitate selection of a particular bidder of the GoM's choice. It is further contended by Mr. Kadam that the tailor-made eligibility clauses have no nexus whatsoever with the objectives sought to be achieved by the award of contract in terms of the RFP. Referring to the clauses of the RFP, our attention has been drawn to the grounds forming part of paragraph 20 of the writ petition.

5. According to Mr. Kadam, in a pre-bid meeting the onerous terms and conditions were pointed out by the intending bidders with the expectation that there would be relaxation of the rigours. However, to the utter surprise, the terms and conditions were made more stringent by issuing a corrigendum dated 19th May, 2022.

6. We may note from paragraph (iv) of the petition memo under the heading "Points to be heard", what are the points that the petitioner wishes to urge:

"(iv) The afore-mentioned impugned Clauses, despite them having been amended stand unreasonable, arbitrarily and unjustified on the following grounds: They require the bidders to **Firstly**, have an average annual turnover of at least Rs. 75 crores from manufacturing/ supplying and printing PC/PVC/PetG/ABS cards in the last three financial years (Which prior to the amendment stood at Rs. 100 Crores), **Secondly**, have an experience of manufacturing the Polycarbonate cards through Laser Engraving technology in Government (State/Central/UT) /Semi-Government/Corporation/PSU/PSU Banks in India in the last three financial years (Which prior to the amendment sought experience in manufacturing or printing or issuing) and **Thirdly**, have positive net worth in the last financial year (without providing for any minimum number like that in turnover and the marking is also lesser than turnover) **Fourthly**, requiring the

bidder to be a company registered under the Indian Companies Act, 1956/2013 and thereby restricting the bidders to not form a Consortium which otherwise would have enabled them to fulfil the requirements relating to pre-eligibility criterion, further entailing them to undertake the implementation of the project.

(v) Consequently, the Petitioner has approached this Hon'ble High Court seeking the elimination of the aforesaid conditions based on the following contexts. **Firstly**, the turnover requirement is in contravention to the CVC guidelines as it is not commensurate with the cost of the Project and further excludes the otherwise competent manufacturers from the bidding process only on the basis of their overall company turnover. The Clause relating to specifying turnover requirement, Rs. 75 Crore is the basic pre-eligibility criteria and against which no marks for technical bid evaluation are awarded, the highest mark of 30 is given if the bidder has 175 Crore of turnover. The same shall not only curtail competition but has no nexus with the cost of the Project. Significantly, the reduction in turnover from Rs. 100 cr. To 75 cr. has no basis and the same is still excluding competent Implementing Agencies who have been implementing E-governance Contracts. Thus, the turnover requirement is allowing turnover from *manufacturing/supplying, and printing PC/PVC/PetG/ABS cards from bidders who are even from unrelated sectors* at the cost of excluding those bidders like the Petitioner who has major experience of implementing DL/RC Contract in India.

Such a criterion has undoubtedly created an artificial barrier to participation of the competent manufacturers and has dismantled the evaluation process of a tender which should otherwise be to select the *best person available for the cause*.

Secondly, Clause 2.16(4) under the head of project Experience is requiring experience of only manufacturing PC cards with Laser Engraving Technology which shall leads to unfair disqualification of numerous other competent bidders. The said clause, with supreme deliberations, was altered/replaced from seeking past experience from either manufacturing or issuing or

supply to merely 'manufacturing', thereby making the referred pre-eligibility condition more stringent, restrictive and uncompetitive. Needless to mention that the said laser engraving technology has till date, solely been implemented by a organization based out of the UT of Andaman & Nicobar Islands. Hence, it shall be correct to state that the referred clause is unquestionably tailor made to favour a particular bidder. Furthermore, in pursuance of the Central Motor Vehicle Rules amended *vide* notification dated 01.03.2019 issued by MoRT&H, the Smart card based DL & RC can either be made of Polyvinyl Chloride (PVC) or Acrylonitrile Butadiene Styrene or PET G or Poly Carbonate (PC), in view thereof, the experience of bidders, such as the Petitioner in issuing the Smart cards under one of the 'eligible' technologies across numerous other States and UTs ought to be considered as adherence of the pre-eligibility criteria. Pertinently, the Petitioner has the wherewithal to implement the said technology of PC card with laser engraving but owing to it being a new technology introduced by MoRTH only in 2019, the Petitioner does not have requisite experience relating to it. It will be unfair to exclude the Petitioner, when he otherwise has significant experience of implemented SCOSTA based smart card projects as per MoRT&H Rules.

Thirdly, the RFP is not seeking any prior experience in the issuance and supply of DL/RC-based smart cards which are specific to the tender process, instead, it is seeking the experience of manufacturing and supply of Polycarbonate (PC) cards. Hence, the same is in contravention to the CVC guidelines which specify that the procuring entity should specify the pre-qualification criteria from some similar work executed in the past, without appropriately amending the different parameters according to the requirements of the present work. The scope of the Project of issuance of DL/RC based smart card in the impugned RFP is not just manufacturing of the cards, rather it requires the bidder to act as the System Integrator and undertake all activities relating to supply and maintenance of IT infrastructure, backend processing on VAHAN and SARTHI, etc. Thus, the mandatorily seeking experience in the manufacturing of PC cards is not in line with the objectives of the RFP. The

impugned condition is excluding otherwise competent bidders, which is against the government procurement norms.

Fourthly, Clause 2.16(2) which requires the bidder to have a positive net worth, seems unreasonable, contradictory & arbitrary as on one hand the RFP is seeking average Rs. 75 crore turnover for last three years as basic qualification and on the other hand only specifying positive Net-worth for qualification without mentioning any figure, which manifests that the eligibility criteria are tailor-made to favour few manufacturers. It is Net-worth and not turnover which is an essential criterion for determining an entity's financial position and credibility. However, the tender condition is only seeking just positive net worth as qualification and providing for maximum 10 marks of having Rs. 6 Crores of Net-worth as against providing 30 marks for maximum of Rs. 175 Crores onwards of Turnover, which is unreasonable.

(i) **Fifthly**, it shall be crucial to highlight that since the referred tender was floated with the intent to onboard an organization to establish a centralized portal for issuance and supply of Smart card based DL and RC. Meaning that the said tender is primarily concerned with the delivering of not just the requisite goods, i.e., the Smart cards but also, the service which shall be inclusive of

- (a) Establishments and setting up of RTOs
- (b) Recruiting and procuring human resources.
- (c) Establishment of customer support portals.
- (d) Ensuring the Deliver, issuance and supply of Smart cards through vendors etc.

This entails that a manufacturer who may otherwise be eligible for the referred tender, by way of complying with the pre-eligibility criterion may necessarily not be competent for the said job."

7. The main points urged by Mr. Kadam are: (i) the RFP together with its corrigendum dated 19th May 2022 is absolutely in violation of the objective of the tender process and undisputedly excludes the otherwise competent

manufacturing and service providing agencies, like the petitioner to participate; (ii) the superfluous changes brought about by the corrigendum only make the tender process more non-competitive, arbitrary and discriminatory; (iii) the restrictive terms have no nexus whatsoever with the objective sought to be achieved by awarding the contract in pursuance of the impugned RFP; (iv) elimination of a whole lot of intending bidders by designing clauses to suit a few suffers from the vices of illegality, irrationality and procedural impropriety.

8. In course of hearing, Mr. Kadam did not cite any decision. However, we place on record that after judgment on this writ petition was reserved, Mr. Kadam tendered the decisions of the Supreme Court in **National High Speed Rail Corporation Limited vs. Montecarlo Limited**, (2022) 6 SCC 401, and **ICOMM TELE Limited vs. Punjab State Water Supply and Sewerage Board**, (2019) 4 SCC 401, and sought to rely on paragraphs 28 and 29 of the former decision and paragraphs 14 to 19 of the latter decision.

9. Mr. Kadam, thus, prayed for grant of relief as claimed in the writ petition.

10. By filing a reply-affidavit, the respondents have pleaded as follows:

"6. I say that issuance of Driving License (hereafter referred to as "**DL**" for the brevity) and Registration Certificate (hereinafter referred to as "**RC**" for the brevity) is governed by Motor Vehicles Act, 1988 and Central Motor Vehicles Rules, 1989. The Rule 16 and 48 of said Rules of 1989 provide for the format for issuance of Driving License and Registration Certificate. Currently,

there are two separate service providers working with the State Government for issuance of DL and RC in the State, the Petitioner being the service provider for Polyvinyl Chloride (PVC) Smart card RC.

7. I say that since the tenure of both the service providers has expired, the Transport Commissioner has floated the RFP to onboard a service provider to provide a centralized printing facility for printing of Poly Carbonate based RC & DL at three identified locations in Maharashtra for a period of 5 years (**Pg. 85**). Office of Transport Commissioner has issued Tender Notification bearing No. TCO/Comp/RCDL Tender/2021/On4180 dated 25/03/2021, for the purpose of selecting a competent entity through a two-bid process involving technical as well as financial criteria, which ought to be fulfilled by the prospective bidders for securing their selection.

8. I further say that after issuance of the above RFP the pre-bid meeting was held on 12.04.2021, wherein 23 participants attended this meeting, whereat all pre-bid queries were satisfactorily dealt with. It is admitted position that the Petitioner also participated in the said pre-bid meeting.

9. I say that the Pre-Qualification (hereinafter referred to as **PQ** for the brevity) and Technical Qualification (hereinafter referred to as **TQ** for the brevity) criteria were discussed in a High Power Committee meetings under the Chairmanship of Chief Secretary and the condition as mentioned in PQ and TQ were finalized.

10. I say that final Corrigendum incorporating all the changes was published on 19.05.2022. The last date for submission bid was 09.06.2022. The technical bids were opened on 15.06.2022.

11. I state that in the present Petition the Petitioner has assailed the PQ as provided under Clause 2.15 and the TQ provided under Clause 2.16 at Sr. No. 1 (Turnover), Sr. no. 2 (Net Worth), Sr. No. 5 (Experience) of the impugned RFP dated 25/03/2021. At the outset, I deny deal and every contention raised in support of such challenge.

12. At this juncture itself, I say that the impugned tender conditions are in no way discriminatory as alleged and are included only after thorough application of mind by the experts and after duly considering the requirements of the present Project. Therefore, the contention of the Petitioner that the impugned tender conditions are violative of Article 14 and 19(1)(g) is devoid of any merit and as such deserves to be rejected.

13. I categorically deny the contention of the Petitioner that the impugned criteria in Clause No. 2.15 and 2.16 of the RFP are included in order to make the tender process non-competitive and discriminatory and tailor made. I state that the aforesaid clauses of prequalification criteria namely clause 2.15 and TQ namely clause 2.16 are specifically provided in order to invite the bidders who possess the requisite capacity to implement the said project, which mainly aims at printing of DL/RC on PC cards with laser engraving technology.

14. I say that the Ministry of Road Transport and Highways vide Notification adted 01/03/2019 amended the Central Motor Vehicles Rules, 1989, by providing detailed specifications of the form and format for issuance of DL and RC. Among the other things, the Notification providers for the following type of cards to be used for issuance of RC/DL, namely, Polyvinyl Chloride [hereinafter referred to as **PVC** for brefity] or Acrylonitrile Butadiene Styrene or Pet G or Poly Carbonate (hereinafter referred to as **PC** for brevity). The amended Rule 11(c) in Annexure XI regarding material specifications of card reads thus:

'Card Material and Construction – the cards shall be made of Polyvinul chloride, acrylonitrile Butadiene Styrene (ABS) or PetG or Poly Carbonate (PC) Plastic material unless specified otherwise. The card construction shall be made of bonded materials with inserts of ISO7816-e compliant contact chip (for ICC) if provided, or with inserts of the ISO144443 compliant contactless chip with associated antenna (for PICC), if provided'.

The copy of the said amended notification dated 01/03/2019 has already been annexed to the Petition.

15. I say that thus the said amended Rule, regard Card material for the DL/RC cards, gives the choice/option of the aforesaid materials to be used for the printing of the said cards. I say that the authority to take decision in that regard, as to which material is to be used for the DL/RC cards, rests with the respective State Governments. I say that the Respondents in their administrative wisdom and discretion have consciously chosen the PC material for printing of the DL/RC cards, *albeit* after due consideration of various factors and advantages of the same as elaborated further in the present Affidavit in Reply and the same is indisputably administrative prerogative of the State. Accordingly, in view of this decision, the tender conditions regarding requirement of prior experience with respect to PC cards that of manufacturing/installed capacity, printing supply and of PC cards has been specified in the RFP.

17. I further submit that as per powers vested in the State Government for selection of the card material for DL and RC, the State Government has decided to adopt PC based cards for the inherent qualities and sturdiness of the material. It may be appreciated that manufacturing of PC card and PC card personalization through Laser Engraving Technology, is new and upcoming technology and it a superior technology compared to other options available as per the MoRTH Notification dated 01.03.2019.

18. Further PC is a high-quality material having long life. Also, the Laser Engraving based personalization of the card makes the PC card highly secured making counterfeiting highly difficult. It is submitted that with advancement of technology, it is imperative that the State Government also adopts the modern and the most updated technologies, which in present case, is the use of PC cards with laser engravings.

19. in the aforesaid regard, shorn of technical details, it may be appreciated in its proper perspective that since the PC Card is made of multiple layers, the laser engraving is done on the inner layers of the PC card and not on the outer layer/surface layer as in the case of PVC cards, which have surface printing. Surface printing

can get easily rubbed or get faded with passage of time as the life/validity of such cards namely DL and RC cards is expected to be upto 20 years. Therefore, printing by laser engraving on PC cards is much more advanced option.

20. The aforesaid technical aspect also demonstrates that the said selection of card as also printing mode will help in preventing fabrication/duplication to a great extent since the laser engraving, which is done on the inner layers of the PC card results in the printed material and/content of the card lasting longer as the same does not get removed with time or faded with time. Moreover, the machines/equipment which are used for carrying out the laser engraving on PC cards are extremely expensive and therefore difficult to procure thereby immensely reducing the possibility of fabrication and/or duplication. As such keeping in mind the safety and security factor as well, the State of Maharashtra has preferred the PC cards with laser engraving offers a lot better option than the other methods.

22. I further say that the pre-qualification criteria of positive net worth and turnover of Rs.75 crores has been kept to get only financially strong bidders participating in the tender process taking into account the estimated cost of the project. The Tendering Authority has relied on the various guidelines issued by Central Vigilance Commission (hereafter referred as 'CVC') and Ministry of Electronics and Information Technology (hereafter referred as 'MeitY') for finalizing the selection criteria. Further, the CVC and KeitY has provided for prescriptive guidelines for tendering authorities, and not rules dictating the same.

27. I further state that the financial turnover prequalification criteria, as mentioned in the RFP, is also very well in consonance with the CVC guidelines dated 17/12/2002. The said guidelines clearly provide in clause 5A that for civil works, average annual financial turnover during the last three years, ending 31st March of the previous financial year, should be at least 30% of the estimated cost. Therefore, as per the CVC guidelines the

minimum average annual financial turnover requirement is 30% which is the lowest limit. Therefore, the requirement of average annual turnover of Rs. 75 Cr given in the RFP is in complete consonance with the aforesaid guidelines of the CVC considering the cost of the project estimated. Thus, this objection regarding the Turnover is completely flawed, baseless and serves to be rejected.

31. I further state that the Petitioner has also assailed the requirement of experience of manufacturing PC cards in the tender document. I state that first of all the experience of manufacturing of the PC cards is not a mandatory prequalification criterion but is the technical criteria, which provides for weightage/score to the prospective bidders based upon their installed capacity. I state that this requirement/technical criterion has been provided in order to ensure continuous supply of cards. In case where any entity who is implementing the project does not have experience/installed capacity with respect to manufacturing of the PC cards, the same may lead to disruption in the printing process due to unavailability/shortage of supply of the PC cards. This may lead to delay in the service provided on account of delay in printing, thereby causing grave inconvenience to the public at large, who will suffer on the account of incapacity of the project implementing agency. Therefore, the requirement of the technical criteria with respect to manufacturing of PC cards has been provided appropriate weightage based on the installed capacity of the bidders.

34. I further say that the Department has received four bids in the present tender process. As aforesaid, the technical bids were opened on 15.06.2022. Currently, technical evaluation of the bids is in progress, post which, financial bids of the technically qualified bidders shall be opened and the final QCBS based scores shall be submitted to High Power Committee for final approval. It is submitted that delay in the present tender process will lead to undue benefit to the Petitioner who is the current vendor. I say that the present Petitioner is interested in

delaying the tender process in view of the fact that delaying the tender process will ultimately benefit the Petitioner in as much as the Petitioner will continue with his work, till the bids are finalized.”

11. Referring to such averments, Mr. Kumbhakoni, learned Advocate General contended that law is well settled that the terms and conditions of a tender cannot be challenged by a prospective bidder. In the present case, he contended, the GoM has decided to throw open the competition without restricting it to the transport sector. According to him, insistence of the GoM for a bidder to be selected and awarded the contract with the requisite net worth, turnover, experience, etc. cannot be branded as arbitrary only because the petitioner does not fulfil such criteria. It was submitted that the very fact that the tendering authority had received four (4) bids is sufficient to prove that the competition is not restricted with a view to favour any particular bidder.

12. Reference was made by Mr. Kumbhakoni to several decisions of the Supreme Court in support of his contention that the terms and conditions of a tender are not open to challenge. Such decisions are **Association of Registration Plates vs. Union of India & Ors.**, (2005) 1 SCC 679, **Silppi Constructions Contractors vs. Union of India & Ors.** (2020) 16 SCC 489, **Uflex Ltd vs. Government of Tamil Nadu & Ors.**, (2022) 1 SCC 165, and **Agmatel India P. Ltd vs. Resoursys Telecom & Ors.**, (2022) 5 SCC 362.

13. Resting thereon, Mr. Kumbhakoni has prayed for dismissal of the writ petition.

14. In the rejoinder-affidavit of the petitioner, we find the following statements to have been made:

“15. As stated by the Respondent State, four companies have submitted their bids for the aforementioned RFP for issuances of smart card based Driving License and Vehicle Registration in the State of Maharashtra, namely:

- (i) M/s. GR MSS PVT LTD
- (ii) M/s. M and S Services
- (iii) M/s. Manipal Cards Technology Private Limited
- (iv) M/s. Seshaasai Business Forms Pvt. Ltd.

It is significant to demonstrate the actual facts relating to the aforementioned bids to reflect that the bidding process appears to be uncompetitive which is leading to qualification of only two bids and may lead to high prices.

- (i) Out of these four companies M/s. GR MSS PVT LTD does not meet eligibility criteria for seeking financial and technical experience in the last 3 years as it **is incorporated** on 26.06.2021. Thus, the said bid is anyways invalid.
- (ii) Further M/s. M & S Services is apparently not a company registered under the Companies Act 1956 which is in contravention to the minimum pre-eligibility criteria which requires a bidder to be a body corporate. It implies that it does not fulfill the eligibility criteria requirements of the tender itself as requested in clause number (**Clause 2.15. Under Section 2: Instruction to Bidders Page-22**) of the eligibility criteria of the tender. Furthermore, M&S submitted its bid on 13.09.2021 which is even prior to the issuance of corrigendum on 19.05.2022. The said bid expired on the bid submission date as the bid is valid only till 180 days.
- (iii) As far as M/s. Seshaasai Business Forms Pvt. Ltd. is concerned, it is apprehended that it is likely to score less technical marks, which if happens, then it will have the implication of M/s. Manipal Cards Technology Pvt. Ltd. becoming the single bid which

will qualify, and this will lead to high prices. It is a matter of fact that the said entity has no experience in issuing DL/RC Smart cards.

Copy of the letter dated 20.06.2022 preferred by the Petitioner to the Respondent State after bid opening is annexed herewith as **Exhibit R-1**.

Furthermore, it is a matter of record that only two bidders namely M/s. Sessaasai Business Forms Pvt. Ltd. and Manipal Cards Technology Pvt. Ltd. have technically qualified. It reflects that the pre-eligibility criteria are tailor-made to exclude major DL/RC Implementing agencies from the tender process. It makes the bidding process prone to bid rigging and charging of higher prices which causes loss to the public exchequer. It is significant to mention that the impugned clauses and systematic exclusion of DL/RC Implementing Agencies will clearly lead to imposition of 3 times high prices for DL/RC issuance than the existing rates, as seen from the similar tender process in Chhattisgarh, wherein M/s. Manipal Cards Technology Pvt. Ltd. has been selected at the rates of Rs. 92 and Manipal Cards Technology Pvt. Ltd. is the same entity which has been technically qualified in the present tender process. Mere technical qualification of only 2 bidders, and exclusion of those entities who are into implementing DL/RC smart contracts manifest that the pre-eligibility conditions are too restrictive and deserves to be judicially reviewed."

(emphasis in original)

15. An affidavit-in-sur rejoinder dated 29th August, 2022 filed on behalf of the respondents does not specifically deal with the statements made in paragraphs 15 and 16 of the rejoinder-affidavit. In the absence of a specific denial, the statements made in paragraphs 15 and 16 of the rejoinder-affidavit are deemed to be correct. It is, therefore, not 4 (four) but 2 (two) bidders who *prima facie* can be said to have the basic eligibility to enter the zone of consideration.

16. It is in the above background that we are called upon to decide whether, and to what extent, should at all there be an interference with the process that has been initiated pursuant to the impugned RFP.

17. The underlying theme of challenge appears to be that the GoM has proceeded in an arbitrary and high-handed manner and designed the RFP in such a manner that it creates artificial barriers, thereby knocking-off service providers who are already in the business of implementing Driving License/Registration Certificate smart card-based projects in various States/Union Territories and have pitched the requisite net worth, turnover and experience at such a high standard for crossing the threshold eligibility criteria that only a select few service providers would only be eligible to participate.

18. A case of this nature calls for a decision upon due consideration and thorough examination of the rival claims as evident from the writ petition and the affidavits. It is for this reason that we have extracted extensively what the pleaded cases of the parties are. But before we proceed to express our views on the contentious issues, it would be apposite to draw guidance from the decisions cited at the bar.

19. In **Montecarlo Limited** (supra), the Court after referring to various precedents in paragraph 28 and its several sub-paragraphs reiterated what was earlier held in **Jagdish Mandal vs. State of Orissa**, (2007) 14 SCC 517, that before interference in exercise of judicial review powers in a matter relating to award of a contract, the following questions have to be posed:

“(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: ‘the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached’? And

(ii) Whether the public interest is affected?”

The Court reminded that should the answers to the above questions be in the negative, then there should be no interference under Article 226.

20. The decision in **ICOMM TELE Limited** (supra) struck down clause 25(viii) of the notice inviting tender, being an arbitration clause, on the ground that the same was arbitrary and hence, violative of Article 14 of the Constitution. In paragraph 27, the Court held that deterring a party to an arbitration from invoking the alternative dispute resolution process would discourage arbitration and render the arbitral process ineffective and inexpensive.

21. In paragraphs 35, 38 and 39 of the decision in **Association of Registration Plates** (supra), the Supreme Court had this to observe:

“35. Taking up first the challenge to the impugned conditions in the notices inviting tenders issued by various State authorities, we find sufficient force in submissions advanced on behalf of the Union and the State authorities and the contesting manufacturers. The State as the implementing authority has to ensure that the scheme of high security plates is effectively implemented. Keeping in view the enormous work involved in switching over to new plates within two years for existing vehicles of such large numbers in each State, resort to ‘trial-and-error’ method would prove hazardous. Its concern to get the right and most competent person cannot be questioned. It has to eliminate manufacturers who have developed recently just to enter into the new field. The insistence of the State to search for an experienced manufacturer with sound financial and technical capacity cannot be misunderstood. The relevant terms

and conditions quoted above are so formulated to enable the State to adjudge the capability of a particular tenderer who can provide a fail-safe and sustainable delivery capacity. Only such tenderer has to be selected who can take responsibility for marketing, servicing and providing continuously the specified plates for vehicles in large numbers, firstly in the initial two years, and annually in the next 13 years. The manufacturer chosen would, in fact, be a sort of an agent or medium of the RTOs concerned for fulfilment of the statutory obligations on them of providing high security plates to vehicles in accordance with Rule 50. Capacity and capability are the two most relevant criteria for framing suitable conditions of any notices inviting tenders. The impugned clauses by which it is stipulated that the tenderer individually or as a member of a joint venture must have an experience in the field of registration plates in at least three countries, a common minimum net worth of Rs 40 crores and either joint-venture partner having a minimum annual turnover of at least Rs 50 crores and a minimum of 15% turnover of registration plates business have been, as stated, incorporated as essential conditions to ensure that the manufacturer selected would be technically and financially competent to fulfil the contractual obligations, which, looking to the magnitude of the job, requires huge investment qualitatively and quantitatively.

38. In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, greater latitude is required to be conceded to the State authorities. Unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of the class of intending tenderers under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep indigenous manufacturers out of the field. It is explained that on the date of formulation of scheme in Rule 50 and issuance of guidelines thereunder by the Central Government, there were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long-term basis and in a manner to ensure safety and security which is the prime object

to be achieved by the introduction of new sophisticated registration plates.

39. The notice inviting tender is open to response by all and even if one single manufacturer is ultimately selected for a region or State, it cannot be said that the State has created a monopoly of business in favour of a private party. Rule 50 permits the RTOs concerned themselves to implement the policy or to get it implemented through a selected approved manufacturer.”

(emphasis ours)

22. Paragraphs 19 and 20 of the decision in **Silppi Constructions Contractors** (supra) sound caution in the following words:

“19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges’ robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give ‘fair play in the joints’ to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

(emphasis ours)

23. An instructive passage is found in paragraph 47 of the decision in **Uflex Ltd.** (supra). It reads:

"**47.** Insofar as the participating entities are concerned, it cannot be contended that all and sundry should be permitted to participate in matters of this nature. In fact, in every tender there are certain qualifying parameters whether it be technology or turnover. The Court cannot sit over in judgment on what should be the turnover required for an entity to participate. ***"

24. Finally, the decision in **Agmatel India P. Ltd.** (supra), upon consideration of various precedents lays down the law as under:

"**26.** The abovementioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its interpretation is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the constitutional court, that, by itself, would not be a reason for interfering with the interpretation given."

25. The legal position, as can be discerned from the aforesaid decisions, needs no elaboration. Scope of judicial review is very limited. None can possibly doubt that in matters relating to challenge to terms and conditions of a tender notice or the award of a contract pursuant to such notice, the Court ordinarily ought to stay at a distance unless, of course, the process adopted or the decision made by the tendering authority is *mala fide* or intended to favour someone and also when the decision made is so arbitrary or irrational that the Court can say that no responsible authority, acting reasonably and in accordance with the relevant law, could have reached such decision.

26. Decisions of the Supreme Court are legion that award of contract is essentially a commercial transaction, which must be determined on the basis of considerations relevant to such commercial decision. It is not the function of the Court to determine what the requisite net worth or turnover or experience ought to be, nor for that matter can such aspects be dealt with on mere suspicion of persons who decide to approach the Court. Some leeway to enter into contracts has to be conceded to the Government, for, a "free play in the joints" is recognized to be a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. The freedom of contract that any Government of the day enjoys ought not to be lightly interfered bearing in mind the public functions that it is mandated to discharge and the larger public interest that invariably is, or ought to be, the paramount consideration

behind the commercial decision. Any restraint placed on such freedom has the potential of bringing about undesirable results including delay in completion of projects and escalation of costs. However, it cannot be gainsaid that any such decision when challenged in a Court must not only be tested on application of the Wednesbury principle of unreasonableness but must also be free from arbitrariness not affected by bias or actuated by *mala fides*.

27. Looking at the writ petition, which must contain averments forming the foundation of the challenge, we find an allegation of *mala fide* to have been levelled in paragraph 9 and that too quite vaguely. We would assume that by 'threshold of mala fide', what the petitioner seeks to urge is that the decision of tailoring the terms and conditions of the tender to suit a few chosen manufacturers borders on *mala fides*. That apart, an allegation is traceable in Ground W that drafting of the tender document has been carried out with the intent of malice and in an unfair, unreasonable and non-transparent manner. This is all that we find about *mala fide* or malice having vitiated the process of decision making.

28. True it is, the reply affidavit of the respondents does not deal with each and every paragraph of the writ petition. However, Grounds B, M and N of the writ petition are sufficient in itself to demolish the charge of *mala fide* intent or malice being a vitiating factor. We extract the same below:

B. It is submitted that owing to the malign (sic, *mala fide*?) tender conditions, it is believed that most of the existing entities already implementing DL/RC, who are otherwise competent to undertake the referred execution of the said Tender project, and have ample

experience & expertise shall in all probability be excluded from the bidding process.

M. It is submitted that the requirement of the experience of manufacturing of the Polycarbonate Cards with laser technology is absurd and contradictory to the government guidelines and has been developed in an absurd fashion to only restrict and exclude all the other competent bidders executing similar projects in the country. CMVR as amended vide Notification dated 01.03.2019 issued MoRT&H provide that the DL/RC smart cards can be made of either Polyvinyl Chloride (PVC) or Acrylonitrile Butadiene Styrene or Pet G or Poly Carbonate (PC). However, the pre-eligibility criteria of the instant RFP only seek prior experience from the bidders in specifically manufacturing of Polycarbonate Cards through Laser Engraving Technology. Therefore, since the CMVR allow manufacturing and supply of DL/RC smart cards made of Poly Vinyl Chloride (PVC)/Acrylonitrile Butadiene Styrene (ABS)/PetG plastic construction with overlay to allow colour dye sublimation printing, there appears to be no rationale behind the tender document's requirement of mandatorily seeking experience only in the manufacturing of Polycarbonate based card with laser engraving technology.

N. Furthermore, it is noteworthy to point out that Laser engraving in PC based cards has only been notified pursuant to the Notification dated 01.03.2019 issued by MoRT&H. As aforementioned only one UT namely Andaman & Nicobar Islands has adopted the laser engraving technology on smart card based DL/RC. In view of only one UT implementing the laser engraving technology on smart card based DL/RC, it is only logical to infer that only one or two companies would have the experience in Laser engraving technologies since no other State/UT has adopted this technology. Given this background, only those handful or even less bidders would be able to meet this eligibility criteria and all the other bidders who have been successfully implementing similar projects, however not with the laser engraving technology would be debarred from participating in the tender process.

(emphasis ours)

29. The statements as above, when read with the reply affidavit of the respondents, would leave none in doubt that laser engraving technology being the latest technology available in the market, the GoM seeks to utilize it in the matter of print and supply of PVC smart cards. Such laser engraving technology, as per the admission of the petitioner, has been notified by the Ministry of Road Transport and Highways. Such system has been introduced by the Union Territory administration of Andaman and Nicobar Islands. If the GoM attempts to put in place a new regime which is statutorily permissible and nationally available, can it be argued with any degree of conviction that the terms and conditions of the RFP requiring PVC cards with 'laser engraving technology' are arbitrary or discriminatory, thereby incurring the wrath of Article 14? Can it also be argued that the process is tainted with *mala fides* and is so irrational that the Court can brand the action of the respondents as unreasonable and not in accordance with the relevant law? The answer to these questions cannot but be in the negative.

30. On an intensive examination of the terms and conditions of the RFP, we do not find that they violate the equality clause under Article 14 or encroach on the petitioner's right under Article 19 of the Constitution. Based on the justification shown for the impugned terms and conditions of the RFP, we also do not find that the clauses requiring experience and the quantum of business turnover and net worth are intended only to keep bidders like the petitioner out of the fray.

31. While floating a tender such as the present one involving the latest technology, the right that the tendering authority has, to specify terms and conditions to suit its interest, must be respected by the Court. Having regard to the high stakes involved and the angle of security, it is axiomatic that expert advice was obtained for assessing the requirements of the GoM. We presume that after a long process of deliberation and discussion, the requirements were reduced to writing in the form of the terms and conditions of the RFP. Insertion of onerous eligibility conditions would not, by itself, lead us to the conclusion that restrictive participation, which could ensue thereby, is intended to select a particular bidder and/or to keep at bay bidders who otherwise could have shown interest to participate. Drawing from precedents, it can safely be stated that if the tendering authority wishes to have the most experienced and reputed bidders having the requisite net worth, turnover and experience to participate in the process so as to ensure smooth and timely completion of the work put to tender, we see no reason as to why such a 'free play in the joints' should be despised.

32. Here, in the present case, the GoM has designed the impugned RFP in a manner which, according to it, would subserve public interest. The process has been challenged, *inter alia*, on the ground of the requirements being absurd. That is not an available ground of challenge. We cannot say what is wise or what is absurd. The judicial review court is concerned not with the wisdom of the decision maker or the soundness of the decision but whether such decision has been made lawfully. We do not think that this is a case where the GoM

should be taken to task for having inserted terms and conditions towards eligibility in the RFP, which could be a bit onerous. After all, one has to make a beginning. It could be so that presently there may not be enough players in the market sufficiently experienced in manufacturing, printing and supplying smart cards with laser engraving technology. The Government cannot be expected to wait till such time all the intending bidders gain the requisite experience. It is a matter relating to commercial contract where the GoM has justified with sufficient clarity the need therefor and the Court, on facts and in the circumstances, ought not to act like a proverbial “bull in a china shop” in exercise of its jurisdiction under Article 226 of the Constitution of India.

33. However, having said so, what strikes us is the reticence of the GoM to controvert paragraphs 15 and 16 of the rejoinder-affidavit of the petitioner. Effectively, there were two qualified bidders, the third and the fourth being ineligible to participate on the grounds indicated in such paragraphs which we shall assume to be correct.

34. While one of the two (2) bidders was incorporated only on 26th June, 2021 and, thus, would not have the requisite experience to even bid as per the tender terms and conditions, the other bidder was not even incorporated. For all intents and purposes, these two (2) bidders had put in their bids to raise the arithmetical figure from two (2) to four (4) despite their known ineligibility and, thus, the threshold mark of 3 (three) could not be said to have been achieved. The Revised Manual of Office Procedures for Procurement by the Government Departments contained in Government

Resolution dated 1st December 2016 provides guidance as to how a situation where less than three (3) bidders take part should be dealt with. Clause 4.4.3.1 being the relevant clause reads as follows: -

"4.4.3.1 Extension for the tender period:

A minimum three bidders are required to make the tender competitive. If less than three bidders takes part, the concerned officer should give an extension of one week at first. If it is found that less than three bidders have taken part even after such an extension, a further extension of one week should be given for the second time. No further extension should be given thereafter.

If following situation arises while implementing the tender process, the steps mentioned below should be taken:

- a) If three or more tenders technically qualified, the purchase department can go ahead.
- b) If two tenders become technically qualified, the actual purchase price and the estimated price decided earlier has a difference of (-) 20% to (+) 10%, the purchasing department has liberty to accept the same. If such price do not come under the price band then there should be re-tender.
- c) If no tender is received or a single tender technically qualifies, then there should be retender.

For a tender value of below Rs. Ten (10) lakhs, only one time extension should be given.

If the importance has been given for the timely completion of the work then the purchase officer can decide to go ahead (after giving extension for 2 times) even if less than 3 tenders are received then, he will record appropriate reasons for that. In such a situation, the purchase committee would take extra care about the reasonableness of the price."

35. Although, the Government Resolution is clear that a minimum of three (3) bidders are required to make the tender competitive, any number of bidders less than three (3) does

not *ipso facto* render the tender unworkable. However, in the facts of the present case as noticed in paragraph 33 above, we hold that there were only two (2) bidders who submitted their bids and not four (4). In such a situation, the procedure prescribed in clause 4.4.3.1 has to be followed. Since there are two (2) technically qualified bidders only, the relevant department of the GoM must give extension of one week at the first instance and if there is no response, a further extension of a week has to be given. In the event there are three (3) or more tenders from qualified bidders, the department may proceed further. In case the number of technically qualified bidders is less than three (3), the step indicated in sub-clause (b) should be followed and further action taken in terms of the other sub-clauses. Since the impugned RFP has commenced the process for procurement of DL/RC cards of the requisite specification and is an important project, it would be in the best interest of the public if the process is expedited by the GoM.

36. Subject to the aforesaid observations/directions, the writ petition stands disposed of. No costs.

Digitally
signed by
ATUL
GANESH
KULKARNI
Date:
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(M. S. KARNIK, J.)

(CHIEF JUSTICE)